

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600
<http://www.montgomerycountymd.gov/boa/>

Case No. A-6612

APPEAL OF SHANE C. HICKEY

OPINION OF THE BOARD
(Hearing held June 5, 2019)
(Effective Date of Opinion: June 18, 2019)

Case No. A-6612 is an administrative appeal filed March 21, 2019, by Shane C. Hickey (the “Appellant”). Appellant charged error on the part of Montgomery County’s Department of Permitting Services (“DPS”) in the failure to revoke 16 building permits and in the issuance of building permit number 866014 on March 18, 2019. Appellant alleged that the building permits “were issued based on failure to disclose special exception and required review and approval by Board of Appeals. Issuance of Building Permit No. 866014 without review and approval of improvements by Board of Appeals.”

All of the building permits, including permit number 866014, were issued for the property at 20315 Georgia Avenue, Brookeville, Maryland 20833 (the “Property”). See Exhibit 7, circle 5 and Exhibit 4. Appellant resides at 2716 Lubar Drive, Brookeville, Maryland. See Exhibit 1(a).

Pursuant to section 59-7.6.1.C of the Montgomery County Zoning Ordinance (2014)¹, the Board scheduled a public hearing for June 5, 2019. Pursuant to sections 2A-7 and 2A-8 of the Montgomery County Code, and Board of Appeals’ Rule of Procedure 3.2, the County filed a Motion to Dismiss and for Summary Disposition of the administrative appeal on May 16, 2019. American Tower Corporation Asset Sub, LLC, the holder of special exception S-2312 on the Property, had been permitted to intervene in this administrative appeal (the “Intervenor”). Intervenor filed a Motion to Dismiss and for Summary Disposition through counsel, Gregory Rapisarda, Esquire, on May 28, 2019. Appellant, through counsel William J. Chen, Jr., Esquire, filed a Response to Motion to Dismiss and for Summary Disposition on May 27, 2019 in response to the County’s motion and a Response to American Tower Motion to Dismiss and for Summary Disposition on June 4, 2019. The Board, pursuant to Board Rule 3.2.5, decided the Motions to Dismiss and for Summary Disposition, and the oppositions thereto, at the close

¹ All references to the County’s Zoning Ordinance refer to the 2014 Zoning Ordinance, unless indicated otherwise.

of oral argument prior to the hearing on June 5, 2019. William J. Chen, Jr., Esquire, appeared on behalf of Appellant. Associate County Attorney Charles L. Frederick represented Montgomery County. Christopher Burns, Esquire, appeared on behalf of the Intervenor.

Decision of the Board: County and Intervenor's Motions to Dismiss and for Summary Disposition **granted**;
Administrative appeal **dismissed**.

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, that:

1. On December 23, 1997, the Board granted a special exception, S-2312, to Nextel Communications of the Mid-Atlantic, Inc. for the Property to permit a cellular telecommunications facility consisting of a 10' x 20' equipment building and a 188-foot monopole with panel antennas. See Exhibit 7, circle 30. This special exception was transferred to Intervenor April 18, 2019. See Exhibit 7, circle 36.

2. Between March 31, 1998 and December 9, 2015, DPS issued 16 building permits to various entities for improvements to the telecommunications facility at the Property. See Exhibit 4.

3. On December 6, 2018, Appellant filed a complaint with DPS about the issuance of these 16 building permits for the Property. See Exhibit 3(c).

4. T-Mobile filed an application with DPS on February 11, 2019 for commercial building permit number 866014 for the Property. See Exhibit 7, circle 6-29.

5. On March 1, 2019, DPS replied to Appellant's December 6, 2018 complaint, stating "DPS has found no violations. The tower meets the setback requirements and building permits issued by DPS were approved by the BOA by the granting of the modification." See Exhibit 3(b).

6. On March 18, 2019, DPS issued building permit number 866014 to T-Mobile for the Property. See Exhibit 7, circle 5. The permit authorized T-Mobile to alter the Property with the "[i]nstallation of a 50 KW diesel generator within existing compound boundaries at an existing telecommunication facility per plan, per code". See Exhibit 7, circle 5.

MOTIONS TO DISMISS AND FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

1. Counsel for the County argued that this appeal is about two issues. First, Appellant is requesting that DPS revoke 16 building permits issued for this special exception Property over the past 21 years. Second, Appellant is arguing that DPS

committed an error in the issuance of building permit number 866014 for the installation of a concrete pad and generator on the Property.

Counsel argued that, as to the first issue, the Board has limited jurisdiction and does not have jurisdiction over the decision of DPS not to revoke the 16 building permits issued between 1998 and 2015. He argued that under the County Code, section 8-23(a), the Board has jurisdiction over the revocation of a permit but not over DPS's decision not to revoke a permit. Counsel argued that when a deadline to file an appeal has passed, the Board loses jurisdiction to hear a challenge to the issuance of that permit. *National Institute of Health Federal Credit Union v. Hawk*, 47 Md. App. 189 (1980); *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569 (1994). He argued that, under section 8-23(a), the Board loses jurisdiction over the issuance of a building permit if an appeal is not filed within 30 days. Counsel argued that Appellant is attempting to find a way to appeal building permits that were issued years ago.

Counsel for the County argued that, under *Falls Road Community Association, Inc. v. Baltimore County*, 437 Md. 115 (2014), the courts may not require the executive branch to take enforcement action by a writ of mandamus. He argued that the County Code has authorized DPS, part of the executive branch, to revoke building permits in certain circumstances. Counsel argued that, in this case, DPS made the executive decision not to revoke the 16 building permits at issue, and that the courts have no jurisdiction over DPS's decision-making process.

Counsel argued that Appellant's sole grounds for appealing these 16 building permits is that the Board did not review the issuance of these permits. He argued that at the Board's March 27, 2019 public hearing for the administrative modification of this special exception, the Board made findings of fact and of law, and found that, as a matter of law, the Board did not have to review every building permit under this special exception. Counsel argued that the Board further found that this special exception met the requirements for an administrative modification. See Board Resolution to Reinstate the Modification Granted April 27, 2018 for the Reasons Stated Herein (Case No. S-2312).

Counsel argued that, while DPS's March 1, 2019 denial of Appellant's complaint was based on the Board's April 27, 2018 Resolution, which was later suspended², the Board later approved all modifications made to the Property pursuant to the 16 building permits at their March 27, 2019 hearing, Resolution effective April 18, 2019. He argued that the fact that the Board's original Resolution had to be suspended changes nothing about DPS's reasoning in the March 1, 2019 letter because the Board ultimately approved all the building permits.

Counsel for the County argued that section 8-21 of the County Code enables the Director of DPS to revoke a permit and is a code enforcement type of action. He argued that this section enables the executive branch to enforce a claim of a false statement or misrepresentation of fact in the issuance of a permit and that the Board does not have

² Because Appellant filed a timely request for a public hearing of that Resolution, the Board was required to suspend the Resolution pursuant to section 59-G-1.3(c)(1) of the 2004 Zoning Ordinance.

jurisdiction over section 8-21. Counsel argued that in considering whether there is a false statement or misrepresentation, DPS will consider whether the falsity was material, who committed the mistake, whether DPS knew the site was a special exception, and what DPS's practices and procedures are for bringing permit applications before the Board. He argued that DPS exercised its discretionary authority under section 8-21, and, for the reasons stated in DPS's March 1, 2019 letter and in the Board's April 18, 2019 Resolution granting the administrative modification to this special exception, DPS found no violation of the special exception or in the issuance of any of the building permits. Counsel argued that, under section 59-G-1.3(b)(4) of the 2004 Zoning Ordinance, if DPS finds no violation of a special exception, the Board has no jurisdiction and must dismiss the complaint.

Counsel argued that DPS's failure to revoke the 16 building permits and finding of no violation in the March 1, 2019 letter do not constitute a renewal of these permits. He argued that, quoting *United Parcel Service, Inc.*, 336 Md. at 583-84, "[t]he words 'issuance, renewal, denial, revocation, suspension, annulment, or modification' obviously refer to an operative event which determines whether the applicant will have a license or permit, and the conditions or scope of that license or permit. The plain import of the words would not include a statement simply confirming that a license or permit was issued or denied in the past or defending a past issuance or denial of a license or permit. In the context, the phrase 'approval ... or other form of permission,' on which the protestants place so much reliance, seems to have been designed simply to encompass all forms of licensing regardless of what the particular license or permit may be called. Nevertheless, the appealable event is the issuance, renewal, revocation, etc. of the license or permit. In the present case, this appealable event occurred in 1986 when the application for a building permit was approved and the permit was issued." Counsel argued that the Court recognized that a renewal is not simply the reaffirmation of a past issued permit.

Counsel for the County argued that, in this case, the Board is looking at permits issued years ago. He argued that the March 1, 2019 affirmation from DPS that these permits were properly issued did not give Appellant the right to do anything. Counsel argued that DPS did not grant a renewal or extension and that all the work has been completed years ago under the permits. He argued that Appellant did not appeal the 16 building permits when he should have and now the Board does not have jurisdiction to hear an appeal about the issuance of these permits.

Counsel for the County argued that, as to issue number two, building permit number 866014 was issued to install a six by eight foot concrete pad and a generator within the confines of the special exception area. He argued that plans were submitted in conjunction with this request which show this installation would enhance, not change, the use; the site would remain unmanned, would not cause an increase in traffic, and the site would still require monthly maintenance. Counsel reiterated that the Board has stated it does not need to review every building permit submitted in conjunction with this special exception.

Counsel argued that the Board has recognized that County policy has been to encourage collocation of antennas on existing telecommunications structures, and that includes equipment such as the generator and pad under building permit 866014. He argued telecommunications special exceptions differ from other special exceptions that do not have this same policy encouraging collocation.

2. Mr. Burns, counsel for Intervenor, argued that Intervenor agreed with the County's argument and urged the Board to grant the Motions to Dismiss and for Summary Disposition.

3. Mr. Chen, counsel for Appellant, argued that the issuance of the building permits exceeded the authority conferred by the Board in its 1997 grant of this special exception. Counsel argued that Appellant's position was not that all building permits related to a special exception must be reviewed by the Board, but that the issuance of the building permits in this case went beyond what the Board authorized under the special exception. He argued that these types of permits must go before the Board.

Counsel for Appellant argued that section 8-21 of the County Code authorizes the revocation of a previously issued building permit and does not contain a time limit for when the revocation can occur. He argued that, under this section, a permit can be revoked "in case of any false statement or misrepresentation of fact in the application..." Counsel argued that in this case, the permit applications contained false statements; therefore section 8-21 of the County Code was triggered. He argued that Appellant filed a complaint with DPS because the Director of DPS is the one who can revoke a permit under section 8-21. He argued that if DPS finds a false statement or misrepresentation of fact DPS should be able to react to it, even if it is not discovered within 30 days. Counsel argued that in this case, the false statement or misrepresentation of fact was that the building permit applications failed to disclose that the Property was the site of a special exception.

Counsel argued that DPS's March 1, 2019 response to Appellant's complaint was erroneous because it relied on the Board's April 27, 2018 Resolution, which was subsequently suspended (due to Appellant's request for a public hearing). He argued that this DPS decision finding no violations in response to Appellant's complaint was therefore factually and legally erroneous.

Counsel for Appellant argued that the County's position focuses on the appeal of the issuance of a building permit under section 8-23(a) of the County Code. He argued that this section also includes the appeal of the renewal of a building permit. Counsel argued that DPS's March 1, 2019 denial of Appellant's complaint acted to renew each of the 16 building permits. He argued that in *Theatrical Corporation v. Manayunk Trust Co.*, 157 Md. 602 (1929), the Maryland Court of Appeals found that the words 'renew' or 'renewal' are not words of art and have no legal or technical significance. Counsel argued that, when dealing with a statute or ordinance, the language used is controlling. He argued the Board must take the language in section 8-23(a) of the County Code on its face. Counsel argued that the Board should look to the dictionary meaning of the words

'renew' and 'renewal' and that the words mean 'reaffirm,' 'bring up to date,' 'extend,' 'recommence,' 'recreate,' 'reopen,' 'resuscitate.'

Counsel argued that in this case, the word 'renewal' in section 8-23(a) of the County Code means that when DPS made its March 1, 2019 decision that the permits were good, that action renewed the permits and triggered section 8-23(a). He argued that the Board has jurisdiction to hear an appeal on the renewal of a permit. Counsel argued that, under *United Parcel Service, Inc.*, an appealable event includes a renewal. He reiterated that the Board should look to the language in the ordinance and how it is used.

Counsel for the Appellant argued that at the March 27, 2019 public hearing on the administrative modification of this special exception, the Board considered whether to consolidate that case with this administrative appeal. He argued that, at that time, the Board stated that it had the authority to consider this administrative appeal at a separate hearing to determine whether the permits were properly issued.

Counsel argued that Appellant challenged all the permits in this case because they went to activities that affected the special exception. He argued that the concrete pad and generator authorized under building permit 866014 were not in the original special exception grant. Counsel argued that nothing in the Zoning Ordinance enables the Board to treat telecommunication special exceptions different than other special exceptions. He argued that the additional pad and generator under building permit 866014 were not part of collocation and that the Board had found that this telecommunications facility special exception was not subject to the automatic modification provisions of Section 6409(a) of the Middle Tax Relief and Job Creation Act of 2012. Counsel argued that the pad and generator were a substantial change necessitating Board approval, and that once the Board grants a special exception it retains jurisdiction over that special exception.

CONCLUSIONS OF LAW

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including section 8-23.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in section 2-112, article V, chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. Section 8-23(a) of the County Code provides that "[a]ny person aggrieved by the issuance, denial, renewal, amendment, suspension, or revocation of a permit, or the issuance or revocation of a stop work order, under this Chapter may appeal to the County

Board of Appeals within 30 days after the permit is issued, denied, renewed, amended, suspended, or revoked or the stop work order is issued or revoked. A person may not appeal any other order of the Department, and may not appeal an amendment of a permit if the amendment does not make a material change to the original permit. A person must not contest the validity of the original permit in an appeal of an amendment or a stop work order."

4. Section 59-7.6.1.C.3 of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the building permits, including building permit number 866014, were properly issued.

5. Section 8-21, of the County Code, Revocation of permit, provides:

The director may revoke a permit or approval issued under the provisions of this chapter in case of any false statement or misrepresentation of fact in the application or on the plans on which the permit or approval was based or in case of any violation of the conditions upon which such permit was issued.

6. Under section 59-G-2.58(a)(5) of the Zoning Ordinance (2004), "[a] modification of a telecommunications facility special exception is not required for a change to any use within the special exception area not directly related to the special exception grant."

7. Under section 59-G-1.3(b)(4) of the Zoning Ordinance (2004), when DPS receives a complaint alleging failure to comply with the terms or conditions of a special exception, "[u]pon receipt of the Department's findings and recommendations, the Board may dismiss the complaint if the Department report indicates that such complaint is without merit..."

8. Under section 2A-8 of the County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions after oral argument on the motions prior to the hearing. Board Rule 3.2 specifically confers on the Board the ability to grant motions to dismiss for summary disposition in cases where there is no genuine issue of material fact and dismissal should be rendered as a matter of law (Rule 3.2.2). Under Board Rule 3.2.2, the Board may, on its own motion, consider summary disposition or other appropriate relief.

9. Under Board Rule 3.2.5, the Board must decide the motion after the close of oral argument or at a worksession.

10. The Board finds that there are no genuine issues of material fact to be resolved by the Board. The Board finds, based upon the uncontested evidence, that the 16 permits were all issued over 30 days ago and therefore the Board does not have jurisdiction over all appeal of their issuance. The Board further finds that DPS's March 1, 2019 letter

finding no violation of the special exception through the issuance of the 16 permits was not a renewal of the permits which would confer the Board with jurisdiction under section 8-23(a) of the County Code. In support of this finding, the Board, pursuant to *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569 (1994), finds that DPS's March 1, 2019 affirmation that these 16 permits were properly issued was a reaffirmation of past issued permits, not a renewal of these permits.


Further, as to the 16 permits, the Board finds that, pursuant to *Falls Road Community Association, Inc. v. Baltimore County*, 437 Md. 115 (2014), it lacks jurisdiction to require DPS to revoke the permits or to require DPS to take enforcement action as to those permits. The Board finds that section 8-21 of the County Code enables the Director of DPS to revoke a permit, but that the Board does not have jurisdiction over section 8-21 of the County Code and cannot require DPS to revoke the permits. The Board find in this case that DPS determined, in part due to the Board's April 18, 2019 Resolution granting the administration modification to this special exception, which approved the actions undertaken under these 16 building permits, that the 16 building permits should not be revoked, and that no further enforcement action was necessary in conjunction with these 16 building permits.

Finally, the Board finds that building permit number 866014 for a concrete pad and generator are in the existing special exception structure and are within the confines of the existing special exception. The Board finds that the Board is not required to review all modifications to telecommunications facility special exceptions not directly related to the grant of the special exception. The Board finds that the concrete pad and generator do not change the use and are designed to support the existing facility. Therefore, the Board finds that it was not required to review this specific building permit prior to its issuance.

11. The County and the Intervenor's Motions to Dismiss and for Summary Disposition in Case A-6612 are granted, and the appeal in Case A-6612 is consequently **DISMISSED**.

On a motion by Chair John H. Pentecost, seconded by Member Katherine Freeman, with Vice Chair Stanley B. Boyd and Member Jon W. Cook in agreement, and with Member Bruce Goldensohn necessarily absent, the Board voted 4 to 0 to grant the County and the Intervenor's Motions to Dismiss and for Summary Disposition and to dismiss the administrative appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 18th day of June, 2019.


Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).